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September 18, 2002

United States Department of Transportation
Dockets Management Facility, Room PL-401
400 Seventh Street SW
Washington, DC 20590-001

Docket No. FHWA-2002-12229 -113

To whom it may concern:

I have received a copy of the Notice of Proposed Rulemaking for the Indian Reservation Roads (IRR) Program, published in the Federal Register on August 7, 2002. I appreciate the opportunity to participate and therefore this letter is an official comment regarding the proposed rules and procedures governing the IRR program.

The State of Oklahoma has one of the largest Indian populations in the United States not mention a vast amount of Indian land that is tax exempt. Most Indian communities are located in remote rural areas where access to employment, education, and healthcare is at great distances and where road conditions are unimproved and unsafe. Even though the state provides an annual sum of $6 million in STP funding for rural collectors, it is not enough to address the rural road improvement needs of Indian communities for all 77 counties in Oklahoma. The same can be said about bridge funding. The number of deficient bridges in Oklahoma is among the highest in the nation. For all these reasons, I believe it is the federal government's responsibility to provide IRR funding for roads and bridges serving these Indian communities.

I am also familiar with the Indian Self-Determination and Education Assistance Act (Public Law 93-638, as amended) and support its full implementation throughout Indian country. This law not only creates greater tribal control, it also contributes to the local economy through employment, education, and health care. The federal government's policy should serve to advance Indian self-determination and tribal rights to self-government.

In addition to the above, I have reviewed the NPRM and have the following comments and recommendations with regard to specific sections of the proposed rule. To the extent possible, these comments generally follow the outline of the NPRM.

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Subpart B – IRR Program Policy and Eligibility

I do not support §170.114 as proposed and the list included in Appendix A to Subpart B dealing with allowable uses of IRR funding. The list of allowable uses in Appendix A does not include "indirect cost" in relation to non-construction administrative functions. The final regulation should reflect this thought.

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I agree with the Tribal Transportation Allocation Methodology identified in Subpart C with the exception of the following:

I do not support the proposed §170.276(c). To require a state, county, or municipality to maintain a completed project in accordance with Title 23 U.S.C. §116 would constitute an un-funded mandate. First, the requirement for maintenance in §116 is for all roads constructed with federal-aid funding under Chapter 1 of Title 23 U.S.C. This does not apply to Indian Reservation Roads, which are funded and constructed under Chapter 2 of Title 23 U.S.C. Secondly, the federal government does not provide any maintenance funding to a state, county, or municipality for Indian Reservation Roads. The maintenance requirement should be deleted from §170.276(c).

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§170.294(c) is written, over 30,000 miles of IRR routes would be added at a rate of 100% to the cost-to-construct and vehicle miles traveled components of the formula, so long as they met the requirements of §170.276(c). I disagree with this concept completely. Oklahoma tribes should be funded on an equal basis as other tribes across country, which includes fair and equitable treatment of the IRR inventory. Section 170.294(c) should be revised as follows: "...additional IRR routes at an annual growth rate of 2% per year at the BIA regional level."

Subpart D – Planning, Design, and Construction of IRR Program Facilities

I do not support the proposed §170.420 or §170.433, stating how and when is the IRR-TIP updated. The IRR-TIP is the official document granting Indian tribes expenditure authority for IRR projects. The proposed language does not hold BIA accountable for timely updates of the IRR-TIP except on an annual basis. It also leaves the determination up to BIA as to whether other updates are necessary. Under this scenario, Indian tribes may have to wait an entire fiscal year to receive expenditure authority for certain IRR projects. This is neither acceptable nor is an appropriate use of IRR funding. The final regulation should reflect quarterly updates of the IRR-TIP or as otherwise requested by Indian tribes.

I do not support the proposed §170.480 - Can a tribe review and approve plans, specifications, and estimates (PS&E's) for IRR projects? My disagreement is not with the confirmation that a tribe can assume this function but instead the proposed language requiring the tribe to meet the definition of a state and a required stewardship agreement with the Secretary of Transportation. Title 23 does not prohibit a tribe from assuming the PS&E approval function nor does it require a tribe to qualify as a state. Therefore, the presumption that a tribe must enter into a stewardship agreement in the same manner as a state is not valid, unless a tribe chooses to do so. Title 23 does however, recognize the Secretary of the Interior as a state and thus the PS&E approval function has been delegated to the BIA. Under the ISDEAA, all BIA programs, services, functions, activities or portion thereof, are subject to self-determination contracts and self-governance agreements. The final regulation should reflect that Indian tribes could assume the PS&E approval function under a self-determination contract or self-governance agreement.

I do not support the proposed §170.481 that identifies who must approve PS&E's for IRR projects. On top of all my concerns identified in the previous section, §170.481 poses additional requirements that the Secretary must conduct health and safety reviews of all tribally approved PS&E's. Under §403(e)(2) of the ISDEAA, the Secretary is only required to ensure that proper health and safety standards are included in the agreement. Instead, the BIA has interpreted this provision to mean they have to perform the health and safety function. This is neither required nor is it necessary. The final regulation should reflect that Indian tribes can ensure health and safety so long as proper health and safety standards are included in the contract or agreement.

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I do not support the proposed §§170.501-502 that addresses the contents of right-of-way easement documents and who grants right-of-way. The status of the land should not dictate the content of the right-of-way document and I strongly disagree with the government's reliance upon and reference to 25 CFR 169 (Rights-of-Way Over Indian Lands) in these proposed regulations without appropriate qualifications. Part 169 primarily sets out procedures by which third parties, such as railroads, utilities, and state or local governments, obtain rights-of-ways over reservation lands. Many of the requirements of part 169 are not applicable to Indian tribes securing rights-of-way for roads through their own lands. Another concern is that some tribes have federal statutory authority to grant rights-of-way across their reservations without Secretarial approval under part 169 (See, e.g., 64 Stat. 442, as amended, 75 Stat. 499 § 2). Furthermore, there is no procedure for acquiring rights-of-way over non-alienable fee simple lands. The final regulation should contain a consistent right-of-way easement document. The final regulation should also identify that the party responsible for granting the right-of-way depends upon the status of the land in question.

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I do not support §§170.600 through §170.608 dealing with the contractibility and compactibility of IRR programs, services, functions, and activities. The ISDEAA requires the Secretary to make available all funds for services to which the Secretary would have otherwise provided to a tribe prior to an executed self-determination contract or self-governance agreement. The government's argument that the "up to 6%" is solely for performing inherent federal functions does not carry with it the proper statutory authority to do so, nor is there any evidence that congress intended to earmark these funds for non-contractible activities. I also disagree with the notion that BIA is allowed to withhold administrative funds for project related functions. To continue the practice of withholding administrative funds severely reduces a tribe's ability to directly benefit Indian communities with improved roads and bridges. The final regulation should reflect congressional intent that all IRR funds are subject to the ISDEAA, including BIA's 6%.

I do not support the proposed §§170.614 through §170.618 regarding advance payments. As written, these sections pose additional payment restrictions on tribes beyond the requirements of the ISDEAA and TEA-21. For example, a tribe is required to have an approved TIP prior to the advance payment, regardless of a tribe's share if the IRR funding formula. The net effect severely reduces a tribe's ability to receive a full lump-sum advance payment. As mentioned earlier, the TIP is the official document granting expenditure authority for IRR projects. The TIP is not however, the authority or the mechanism for a lump-sum advance payment under the ISDEAA, it is the executed

self-determination contract or self-governance agreement. The final regulation should reflect this fact.

I do not support the proposed §170.620 regarding the use of savings. I believe the federal position on this issue is completely unreasonable and eliminates the opportunity for tribes to contract, compact, and retain their rightful share of IRR program funding. To begin, Title 25 U.S.C §405e-2 does not even apply to the IRR program. Moreover, the ISDEAA and subsequent regulations are most clear in that savings are to be carried over to provide additional services to which the funds were appropriated. The final regulation should reflect the savings and profit provisions authorized by the ISDEAA.

I do not support the proposed §§170.633-634 regarding self-governance compacts. First, Title IV of the ISDEAA and its implementing regulations (25 CFR Part 1000) clearly identify what programs can be assumed by an Indian tribe under a self-governance agreement. To limit tribal assumption of IRR programs to 25 CFR Part 1000, Subpart K, would unfairly limit a tribe's ability to assume a full-blown roads program as authorized by TEA-21 and the ISDEAA. Subpart K, by itself, only deals with individual construction projects and does not adequately address other activities that are non-construction related. I can find no reference in these proposed IRR regulations identifying that the IRR program is fully subject to the remainder of 25 CFR Part 1000. This is neither lawful nor is it acceptable. Finally, I object to the notion that these IRR program regulations should identify how IRR projects and activities are included in a self-governance annual funding agreement. By statute, all programs, services, functions, and activities are fully subject to negotiation and thus it is entirely inappropriate to include provisions in this regulation that would impose non-negotiable requirements for tribal assumption of the IRR program. The final regulation should reflect these facts.

I do not support the proposed §§170.635-636 dealing with contract support funds. The government's position that contract support funding is not available or applicable to the IRR program is totally inconsistent with the ISDEAA and OMB Circular A-87. Currently, the Interior Department is required to make contract support funding available for all such contracts and agreements in accordance with §106(a) and §403 of the ISDEAA, regardless of program origin. The final regulation should reflect this fact.

Subpart F – Program Oversight and Accountability

I do not support the proposed §§170.701-705 – Content of stewardship agreements. My disagreement with these sections is closely related to PS&E approval authority as discussed earlier. The issue here is whether a tribe is allowed to enter into a stewardship agreement with the FHWA thereby assuming PS&E approval authority, outside of a self-determination contract or self-governance agreement. The answers is yes, nothing in Title 23 U.S.C. prohibits a tribe from entering into a stewardship agreement if the tribe chooses to do so. However, the provisions of a stewardship agreement may be included in a self-determination contract or self-governance agreement if the tribe chooses to do so. I disagree however, with the government's proposal to place additional restrictions and bureaucratic control within the context of these agreements.

The final regulation should incorporate provisions, based on the redesign authorities of the ISDEAA, which allows tribes the choice of whether to include the PS&E approval function within the context of a separate stewardship agreement, a self-determination contract, or in a self-governance agreement.

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Again, I appreciate the opportunity to participate. I am hopeful that my comments will help the committee in its task of preparing the final regulation.

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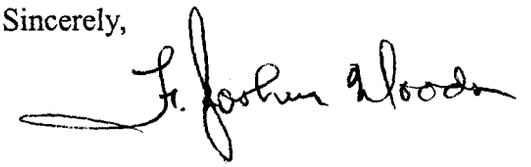

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I do not support the proposed §170.481 that identifies who must approve PS&E's for IRR projects. On top of all my concerns identified in the previous section, §170.481 poses additional requirements that the Secretary must conduct health and safety reviews of all tribally approved PS&E's. Under §403(e)(2) of the ISDEAA, the Secretary is only required to ensure that proper health and safety standards are included in the agreement. Instead, the BIA has interpreted this provision to mean they have to perform the health and safety function. This is neither required nor is it necessary. The final regulation should reflect that Indian tribes can ensure health and safety so long as proper health and safety standards are included in the contract or agreement.

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Subpart E – Service Delivery for IRR

I do not support §§170.600 through §170.608 dealing with the contractibility and compactibility of IRR programs, services, functions, and activities. The ISDEAA requires the Secretary to make available all funds for services to which the Secretary would have otherwise provided to a tribe prior to an executed self-determination contract or self-governance agreement. The government's argument that the "up to 6%" is solely for performing inherent federal functions does not carry with it the proper statutory authority to do so, nor is there any evidence that congress intended to earmark these funds for non-contractible activities. I also disagree with the notion that BIA is allowed to withhold administrative funds for project related functions. To continue the practice of withholding administrative funds severely reduces a tribe's ability to directly benefit Indian communities with improved roads and bridges. The final regulation should reflect congressional intent that all IRR funds are subject to the ISDEAA, including BIA's 6%.

I do not support the proposed §§170.614 through §170.618 regarding advance payments. As written, these sections pose additional payment restrictions on tribes beyond the requirements of the ISDEAA and TEA-21. For example, a tribe is required to have an approved TIP prior to the advance payment, regardless of a tribe's share if the IRR funding formula. The net effect severely reduces a tribe's ability to receive a full lump-sum advance payment. As mentioned earlier, the TIP is the official document granting expenditure authority for IRR projects. The TIP is not however, the authority or the mechanism for a lump-sum advance payment under the ISDEAA, it is the executed

self-determination contract or self-governance agreement. The final regulation should reflect this fact.

I do not support the proposed §170.620 regarding the use of savings. I believe the federal position on this issue is completely unreasonable and eliminates the opportunity for tribes to contract, compact, and retain their rightful share of IRR program funding. To begin, Title 25 U.S.C §405e-2 does not even apply to the IRR program. Moreover, the ISDEAA and subsequent regulations are most clear in that savings are to be carried over to provide additional services to which the funds were appropriated. The final regulation should reflect the savings and profit provisions authorized by the ISDEAA.

I do not support the proposed §§170.633-634 regarding self-governance compacts. First, Title IV of the ISDEAA and its implementing regulations (25 CFR Part 1000) clearly identify what programs can be assumed by an Indian tribe under a self-governance agreement. To limit tribal assumption of IRR programs to 25 CFR Part 1000, Subpart K, would unfairly limit a tribe's ability to assume a full-blown roads program as authorized by TEA-21 and the ISDEAA. Subpart K, by itself, only deals with individual construction projects and does not adequately address other activities that are non-construction related. I can find no reference in these proposed IRR regulations identifying that the IRR program is fully subject to the remainder of 25 CFR Part 1000. This is neither lawful nor is it acceptable. Finally, I object to the notion that these IRR program regulations should identify how IRR projects and activities are included in a self-governance annual funding agreement. By statute, all programs, services, functions, and activities are fully subject to negotiation and thus it is entirely inappropriate to include provisions in this regulation that would impose non-negotiable requirements for tribal assumption of the IRR program. The final regulation should reflect these facts.

I do not support the proposed §§170.635-636 dealing with contract support funds. The government's position that contract support funding is not available or applicable to the IRR program is totally inconsistent with the ISDEAA and OMB Circular A-87. Currently, the Interior Department is required to make contract support funding available for all such contracts and agreements in accordance with §106(a) and §403 of the ISDEAA, regardless of program origin. The final regulation should reflect this fact.

Subpart F – Program Oversight and Accountability

I do not support the proposed §§170.701-705 – Content of stewardship agreements. My disagreement with these sections is closely related to PS&E approval authority as discussed earlier. The issue here is whether a tribe is allowed to enter into a stewardship agreement with the FHWA thereby assuming PS&E approval authority, outside of a self-determination contract or self-governance agreement. The answers is yes, nothing in Title 23 U.S.C. prohibits a tribe from entering into a stewardship agreement if the tribe chooses to do so. However, the provisions of a stewardship agreement may be included in a self-determination contract or self-governance agreement if the tribe chooses to do so. I disagree however, with the government's proposal to place additional restrictions and bureaucratic control within the context of these agreements.

The final regulation should incorporate provisions, based on the redesign authorities of the ISDEAA, which allows tribes the choice of whether to include the PS&E approval function within the context of a separate stewardship agreement, a self-determination contract, or in a self-governance agreement.

Subpart H – Miscellaneous

I do not support the proposed §§170.941-943 dealing with arbitration provisions. This issue is about what alternative dispute resolution methods are available and how alternative dispute resolution options may be used. In cases where it is appropriate, the Alternative Dispute Resolution Act (25 U.S.C.) should be available to tribes as an option to resolve disputes, even in the area of construction. This is not to take away from tribal rights regarding the Contracts Disputes Act or other dispute resolution methods authorized by the ISDEAA, but instead an alternative approach to avoid costly litigation. The final regulation should reflect this thought.

Again, I appreciate the opportunity to participate. I am hopeful that my comments will help the committee in its task of preparing the final regulation.

Sincerely,

September 20, 2002

United States Department of Transportation
Dockets Management Facility, Room PL-401
400 Seventh Street SW
Washington, DC 20590-001

Docket No. FHWA-2002-12229

To whom it may concern:

I have received a copy of the Notice of Proposed Rulemaking for the Indian Reservation Roads (IRR) Program, published in the Federal Register on August 7, 2002. I appreciate the opportunity to participate and therefore this letter is an official comment regarding the proposed rules and procedures governing the IRR program.

The State of Oklahoma has one of the largest Indian populations in the United States not to mention a vast amount of Indian land that is tax exempt. Most Indian communities are located in remote rural areas where access to employment, education, and healthcare is at great distances and where road conditions are unimproved and unsafe. Even though the state provides an annual sum of $6 million in STP funding for rural collectors, it is not enough to address the rural road improvement needs of Indian communities for all 77 counties in Oklahoma. The same can be said about bridge funding. The number of deficient bridges in Oklahoma is among the highest in the nation. For all these reasons, I believe it is the federal government's responsibility to provide IRR funding for roads and bridges serving these Indian communities.

I am also familiar with the Indian Self-Determination and Education Assistance Act (Public Law 93-638, as amended) and support its full implementation throughout Indian country. This law not only creates greater tribal control, it also contributes to the local economy through employment, education, and health care. The federal government's policy should serve to advance Indian self-determination and tribal rights to self-government.

In addition to the above, I have reviewed the NPRM and have the following comments and recommendations with regard to specific sections of the proposed rule. To the extent possible, these comments generally follow the outline of the NPRM.

Subpart A – General Provisions and Definitions

I support the federal government's general policy statement outlined in §170.3 but note that many sections in the proposed rule are not consistent with this concept. This includes: §170.114; §170.116; §170.420; §170.433; §§170.480-481; §§170.485-490; §§170.501-501; §§170.600-606; §§170.614-618; §170.620; §§170.633-636; §§170.701-705; and §§170.941-943. These sections should be corrected in the final rule to reflect the concept outlined in §170.3.

Subpart B – IRR Program Policy and Eligibility

I do not support §170.114 as proposed and the list included in Appendix A to Subpart B dealing with allowable uses of IRR funding. The list of allowable uses in Appendix A does not include "indirect cost" in relation to non-construction administrative functions. Also, the list does not identify "equipment purchases" in connection with administering the IRR program. These items should be included in the list of allowable uses in the final regulation.

I do not support §170.116 as proposed. This section describes the process for determining if a proposed new use of IRR funds is allowable. By allowing some determinations to be made by the Federal Highway Administration (FHWA) and others made by the Bureau of Indian Affairs (BIA) could lead to inconsistent decisions between both agencies. Secondly, the existing appeals process under the ISDEAA does not in itself apply to the FHWA. This could create a "black hole" for determinations made by the FHWA, which may leave tribes with no recourse to reverse the determination. And third, this section poses a negative impact on Indian tribes with respect to redesign and reallocation authority available under the ISDEAA. The final regulation should reflect that the Secretary of Interior makes these determinations.

Subpart C – IRR Program Funding

I agree with the Tribal Transportation Allocation Methodology identified in Subpart C with the exception of the following:

The population component in §170.282 needs further clarification. Once the IRR program is modified to incorporate Indian population counts from the NAHASDA data set, the Indian population figures used *must* include all Indians. This includes those who are recognized as Indian and another race as identified in the 2000 Census. These Indians are on existing tribal rolls and should not be discounted in the final regulation. Otherwise, I would support the BIA Labor Force Report to be used as the official Indian population component.

I do not support the proposed §170.276(c). To require a state, county, or municipality to maintain a completed project in accordance with Title 23 U.S.C. §116 would constitute an un-funded mandate. First, the requirement for maintenance in §116

is for all roads constructed with federal-aid funding under Chapter 1 of Title 23 U.S.C. This does not apply to Indian Reservation Roads, which are funded and constructed under Chapter 2 of Title 23 U.S.C. Secondly, the federal government does not provide any maintenance funding to a state, county, or municipality for Indian Reservation Roads. The maintenance requirement should be deleted from §170.276(c).

I do not support the proposed §170.294(c). The addition of "all IRR routes" in the inventory for funding purposes would create immediate disparity. Many BIA regions including those in Oklahoma have not been allowed include additional IRR or BIA routes to the inventory because of the 2% annual limitation factor. The manner in which §170.294(c) is written, over 30,000 miles of IRR routes would be added at a rate of 100% to the cost-to-construct and vehicle miles traveled components of the formula, so long as they met the requirements of §170.276(c). I disagree with this concept completely. Oklahoma tribes should be funded on an equal basis as other tribes across country, which includes fair and equitable treatment of the IRR inventory. Section 170.294(c) should be revised as follows: "...additional IRR routes at an annual growth rate of 2% per year at the BIA regional level."

Subpart D – Planning, Design, and Construction of IRR Program Facilities

I do not support the proposed §170.420 or §170.433, stating how and when is the IRR-TIP updated. The IRR-TIP is the official document granting Indian tribes expenditure authority for IRR projects. The proposed language does not hold BIA accountable for timely updates of the IRR-TIP except on an annual basis. It also leaves the determination up to BIA as to whether other updates are necessary. Under this scenario, Indian tribes may have to wait an entire fiscal year to receive expenditure authority for certain IRR projects. This is neither acceptable nor is an appropriate use of IRR funding. The final regulation should reflect quarterly updates of the IRR-TIP or as otherwise requested by Indian tribes.

I do not support the proposed §170.480 - Can a tribe review and approve plans, specifications, and estimates (PS&E's) for IRR projects? My disagreement is not with the confirmation that a tribe can assume this function but instead the proposed language requiring the tribe to meet the definition of a state and a required stewardship agreement with the Secretary of Transportation. Title 23 does not prohibit a tribe from assuming the PS&E approval function nor does it require a tribe to qualify as a state. Therefore, the presumption that a tribe must enter into a stewardship agreement in the same manner as a state is not valid, unless a tribe chooses to do so. Title 23 does however, recognize the Secretary of the Interior as a state and thus the PS&E approval function has been delegated to the BIA. Under the ISDEAA, all BIA programs, services, functions, activities or portion thereof, are subject to self-determination contracts and self-governance agreements. The final regulation should reflect that Indian tribes could assume the PS&E approval function under a self-determination contract or self-governance agreement.

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Again, I appreciate the opportunity to participate. I am hopeful that my comments will help the committee in its task of preparing the final regulation.

Sincerely,

September 18, 2002

United States Department of Transportation
Dockets Management Facility, Room PL-401
400 Seventh Street SW
Washington, DC 20590-001

Docket No. FHWA-2002-12229

To whom it may concern:

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I am also familiar with the Indian Self-Determination and Education Assistance Act (Public Law 93-638, as amended) and support its full implementation throughout Indian country. This law not only creates greater tribal control, it also contributes to the local economy through employment, education, and health care. The federal government's policy should serve to advance Indian self-determination and tribal rights to self-government.

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Date

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Subpart B – IRR Program Policy and Eligibility

I do not support §170.114 as proposed and the list included in Appendix A to Subpart B dealing with allowable uses of IRR funding. The list of allowable uses in Appendix A does not include "indirect cost" in relation to non-construction administrative functions. The final regulation should reflect this thought.

I do not support §170.116 as proposed. This section describes the process for determining if a proposed new use of IRR funds is allowable. By allowing some determinations to be made by the Federal Highway Administration (FHWA) and others made by the Bureau of Indian Affairs (BIA) could lead to inconsistent decisions between both agencies. Secondly, the existing appeals process under the ISDEAA does not in itself apply to the FHWA. This could create a "black hole" for determinations made by the FHWA, which may leave tribes with no recourse to reverse the determination. And third, this section poses a negative impact on Indian tribes with respect to redesign and reallocation authority available under the ISDEAA. The final regulation should reflect that the Secretary of Interior makes these determinations.

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I do not support the proposed §§170.614 through §170.618 regarding advance payments. As written, these sections pose additional payment restrictions on tribes beyond the requirements of the ISDEAA and TEA-21. For example, a tribe is required to have an approved TIP prior to the advance payment, regardless of a tribe's share if the IRR funding formula. The net effect severely reduces a tribe's ability to receive a full lump-sum advance payment. As mentioned earlier, the TIP is the official document granting expenditure authority for IRR projects. The TIP is not however, the authority or the mechanism for a lump-sum advance payment under the ISDEAA, it is the executed

self-determination contract or self-governance agreement. The final regulation should reflect this fact.

I do not support the proposed §170.620 regarding the use of savings. I believe the federal position on this issue is completely unreasonable and eliminates the opportunity for tribes to contract, compact, and retain their rightful share of IRR program funding. To begin, Title 25 U.S.C §405e-2 does not even apply to the IRR program. Moreover, the ISDEAA and subsequent regulations are most clear in that savings are to be carried over to provide additional services to which the funds were appropriated. The final regulation should reflect the savings and profit provisions authorized by the ISDEAA.

I do not support the proposed §§170.633-634 regarding self-governance compacts. First, Title IV of the ISDEAA and its implementing regulations (25 CFR Part 1000) clearly identify what programs can be assumed by an Indian tribe under a self-governance agreement. To limit tribal assumption of IRR programs to 25 CFR Part 1000, Subpart K, would unfairly limit a tribe's ability to assume a full-blown roads program as authorized by TEA-21 and the ISDEAA. Subpart K, by itself, only deals with individual construction projects and does not adequately address other activities that are non-construction related. I can find no reference in these proposed IRR regulations identifying that the IRR program is fully subject to the remainder of 25 CFR Part 1000. This is neither lawful nor is it acceptable. Finally, I object to the notion that these IRR program regulations should identify how IRR projects and activities are included in a self-governance annual funding agreement. By statute, all programs, services, functions, and activities are fully subject to negotiation and thus it is entirely inappropriate to include provisions in this regulation that would impose non-negotiable requirements for tribal assumption of the IRR program. The final regulation should reflect these facts.

I do not support the proposed §§170.635-636 dealing with contract support funds. The government's position that contract support funding is not available or applicable to the IRR program is totally inconsistent with the ISDEAA and OMB Circular A-87. Currently, the Interior Department is required to make contract support funding available for all such contracts and agreements in accordance with §106(a) and §403 of the ISDEAA, regardless of program origin. The final regulation should reflect this fact.

Subpart F – Program Oversight and Accountability

I do not support the proposed §§170.701-705 – Content of stewardship agreements. My disagreement with these sections is closely related to PS&E approval authority as discussed earlier. The issue here is whether a tribe is allowed to enter into a stewardship agreement with the FHWA thereby assuming PS&E approval authority, outside of a self-determination contract or self-governance agreement. The answers is yes, nothing in Title 23 U.S.C. prohibits a tribe from entering into a stewardship agreement if the tribe chooses to do so. However, the provisions of a stewardship agreement may be included in a self-determination contract or self-governance agreement if the tribe chooses to do so. I disagree however, with the government's proposal to place additional restrictions and bureaucratic control within the context of these agreements.

The final regulation should incorporate provisions, based on the redesign authorities of the ISDEAA, which allows tribes the choice of whether to include the PS&E approval function within the context of a separate stewardship agreement, a self-determination contract, or in a self-governance agreement.

Subpart H – Miscellaneous

I do not support the proposed §§170.941-943 dealing with arbitration provisions. This issue is about what alternative dispute resolution methods are available and how alternative dispute resolution options may be used. In cases where it is appropriate, the Alternative Dispute Resolution Act (25 U.S.C.) should be available to tribes as an option to resolve disputes, even in the area of construction. This is not to take away from tribal rights regarding the Contracts Disputes Act or other dispute resolution methods authorized by the ISDEAA, but instead an alternative approach to avoid costly litigation. The final regulation should reflect this thought.

Again, I appreciate the opportunity to participate. I am hopeful that my comments will help the committee in its task of preparing the final regulation.

Sincerely,

Anthony Pritchett

September 18, 2002

United States Department of Transportation
Dockets Management Facility, Room PL-401
400 Seventh Street SW
Washington, DC 20590-001

Docket No. FHWA-2002-12229

To whom it may concern:

I have received a copy of the Notice of Proposed Rulemaking for the Indian Reservation Roads (IRR) Program, published in the Federal Register on August 7, 2002. I appreciate the opportunity to participate and therefore this letter is an official comment regarding the proposed rules and procedures governing the IRR program.

The State of Oklahoma has one of the largest Indian populations in the United States not mention a vast amount of Indian land that is tax exempt. Most Indian communities are located in remote rural areas where access to employment, education, and healthcare is at great distances and where road conditions are unimproved and unsafe. Even though the state provides an annual sum of $6 million in STP funding for rural collectors, it is not enough to address the rural road improvement needs of Indian communities for all 77 counties in Oklahoma. The same can be said about bridge funding. The number of deficient bridges in Oklahoma is among the highest in the nation. For all these reasons, I believe it is the federal government's responsibility to provide IRR funding for roads and bridges serving these Indian communities.

I am also familiar with the Indian Self-Determination and Education Assistance Act (Public Law 93-638, as amended) and support its full implementation throughout Indian country. This law not only creates greater tribal control, it also contributes to the local economy through employment, education, and health care. The federal government's policy should serve to advance Indian self-determination and tribal rights to self-government.

In addition to the above, I have reviewed the NPRM and have the following comments and recommendations with regard to specific sections of the proposed rule. To the extent possible, these comments generally follow the outline of the NPRM.

Subpart A – General Provisions and Definitions

I support the federal government's general policy statement outlined in §170.3 but note that many sections in the proposed rule are not consistent with this concept. This includes: §170.114; §170.116; §170.420; §170.433; §§170.480-481; §§170.485-490; §§170.501-501; §§170.600-606; §§170.614-618; §170.620; §§170.633-636; §§170.701-705; and §§170.941-943. These sections should be corrected in the final rule to reflect the concept outlined in §170.3.

Subpart B – IRR Program Policy and Eligibility

I do not support §170.114 as proposed and the list included in Appendix A to Subpart B dealing with allowable uses of IRR funding. The list of allowable uses in Appendix A does not include "indirect cost" in relation to non-construction administrative functions. The final regulation should reflect this thought.

I do not support §170.116 as proposed. This section describes the process for determining if a proposed new use of IRR funds is allowable. By allowing some determinations to be made by the Federal Highway Administration (FHWA) and others made by the Bureau of Indian Affairs (BIA) could lead to inconsistent decisions between both agencies. Secondly, the existing appeals process under the ISDEAA does not in itself apply to the FHWA. This could create a "black hole" for determinations made by the FHWA, which may leave tribes with no recourse to reverse the determination. And third, this section poses a negative impact on Indian tribes with respect to redesign and reallocation authority available under the ISDEAA. The final regulation should reflect that the Secretary of Interior makes these determinations.

Subpart C – IRR Program Funding

I agree with the Tribal Transportation Allocation Methodology identified in Subpart C with the exception of the following:

I do not support the proposed §170.276(c). To require a state, county, or municipality to maintain a completed project in accordance with Title 23 U.S.C. §116 would constitute an un-funded mandate. First, the requirement for maintenance in §116 is for all roads constructed with federal-aid funding under Chapter 1 of Title 23 U.S.C. This does not apply to Indian Reservation Roads, which are funded and constructed under Chapter 2 of Title 23 U.S.C. Secondly, the federal government does not provide any maintenance funding to a state, county, or municipality for Indian Reservation Roads. The maintenance requirement should be deleted from §170.276(c).

I do not support the proposed §170.294(c). The addition of "all IRR routes" in the inventory for funding purposes would create immediate disparity. Many BIA regions including those Oklahoma have not been allowed include additional IRR or BIA routes to the inventory because of the 2% annual limitation factor. The manner in which

§170.294(c) is written, over 30,000 miles of IRR routes would be added at a rate of 100% to the cost-to-construct and vehicle miles traveled components of the formula, so long as they met the requirements of §170.276(c). I disagree with this concept completely. Oklahoma tribes should be funded on an equal basis as other tribes across country, which includes fair and equitable treatment of the IRR inventory. Section 170.294(c) should be revised as follows: "...additional IRR routes at an annual growth rate of 2% per year at the BIA regional level."

Subpart D – Planning, Design, and Construction of IRR Program Facilities

I do not support the proposed §170.420 or §170.433, stating how and when is the IRR-TIP updated. The IRR-TIP is the official document granting Indian tribes expenditure authority for IRR projects. The proposed language does not hold BIA accountable for timely updates of the IRR-TIP except on an annual basis. It also leaves the determination up to BIA as to whether other updates are necessary. Under this scenario, Indian tribes may have to wait an entire fiscal year to receive expenditure authority for certain IRR projects. This is neither acceptable nor is an appropriate use of IRR funding. The final regulation should reflect quarterly updates of the IRR-TIP or as otherwise requested by Indian tribes.

I do not support the proposed §170.480 - Can a tribe review and approve plans, specifications, and estimates (PS&E's) for IRR projects? My disagreement is not with the confirmation that a tribe can assume this function but instead the proposed language requiring the tribe to meet the definition of a state and a required stewardship agreement with the Secretary of Transportation. Title 23 does not prohibit a tribe from assuming the PS&E approval function nor does it require a tribe to qualify as a state. Therefore, the presumption that a tribe must enter into a stewardship agreement in the same manner as a state is not valid, unless a tribe chooses to do so. Title 23 does however, recognize the Secretary of the Interior as a state and thus the PS&E approval function has been delegated to the BIA. Under the ISDEAA, all BIA programs, services, functions, activities or portion thereof, are subject to self-determination contracts and self-governance agreements. The final regulation should reflect that Indian tribes could assume the PS&E approval function under a self-determination contract or self-governance agreement.

I do not support the proposed §170.481 that identifies who must approve PS&E's for IRR projects. On top of all my concerns identified in the previous section, §170.481 poses additional requirements that the Secretary must conduct health and safety reviews of all tribally approved PS&E's. Under §403(e)(2) of the ISDEAA, the Secretary is only required to ensure that proper health and safety standards are included in the agreement. Instead, the BIA has interpreted this provision to mean they have to perform the health and safety function. This is neither required nor is it necessary. The final regulation should reflect that Indian tribes can ensure health and safety so long as proper health and safety standards are included in the contract or agreement.

I do not support the proposed §§170.484-491 dealing with project closeout reports. While it may be necessary to identify who prepares these reports, these sections, as written, violate the single-agency audit, annual trust evaluation, and reporting requirements of the ISDEAA. These activities are adequately covered in 25 CFR Part 900 and in Part 1000. The final regulation should reflect this thought.

I do not support the proposed §§170.501-502 that addresses the contents of right-of-way easement documents and who grants right-of-way. The status of the land should not dictate the content of the right-of-way document and I strongly disagree with the government's reliance upon and reference to 25 CFR 169 (Rights-of-Way Over Indian Lands) in these proposed regulations without appropriate qualifications. Part 169 primarily sets out procedures by which third parties, such as railroads, utilities, and state or local governments, obtain rights-of-ways over reservation lands. Many of the requirements of part 169 are not applicable to Indian tribes securing rights-of-way for roads through their own lands. Another concern is that some tribes have federal statutory authority to grant rights-of-way across their reservations without Secretarial approval under part 169 (See, e.g., 64 Stat. 442, as amended, 75 Stat. 499 § 2). Furthermore, there is no procedure for acquiring rights-of-way over non-alienable fee simple lands. The final regulation should contain a consistent right-of-way easement document. The final regulation should also identify that the party responsible for granting the right-of-way depends upon the status of the land in question.

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Again, I appreciate the opportunity to participate. I am hopeful that my comments will help the committee in its task of preparing the final regulation.

Sincerely,

Levi Gilson

September 20, 2002

United States Department of Transportation
Dockets Management Facility, Room PL-401
400 Seventh Street SW
Washington, DC 20590-001

Docket No. FHWA-2002-12229

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Subpart B – IRR Program Policy and Eligibility

I do not support §170.114 as proposed and the list included in Appendix A to Subpart B dealing with allowable uses of IRR funding. The list of allowable uses in Appendix A does not include "indirect cost" in relation to non-construction administrative functions. Also, the list does not identify "equipment purchases" in connection with administering the IRR program. These items should be included in the list of allowable uses in the final regulation.

I do not support §170.116 as proposed. This section describes the process for determining if a proposed new use of IRR funds is allowable. By allowing some determinations to be made by the Federal Highway Administration (FHWA) and others made by the Bureau of Indian Affairs (BIA) could lead to inconsistent decisions between both agencies. Secondly, the existing appeals process under the ISDEAA does not in itself apply to the FHWA. This could create a "black hole" for determinations made by the FHWA, which may leave tribes with no recourse to reverse the determination. And third, this section poses a negative impact on Indian tribes with respect to redesign and reallocation authority available under the ISDEAA. The final regulation should reflect that the Secretary of Interior makes these determinations.

Subpart C – IRR Program Funding

I agree with the Tribal Transportation Allocation Methodology identified in Subpart C with the exception of the following:

The population component in §170.282 needs further clarification. Once the IRR program is modified to incorporate Indian population counts from the NAHASDA data set, the Indian population figures used *must* include all Indians. This includes those who are recognized as Indian and another race as identified in the 2000 Census. These Indians are on existing tribal rolls and should not be discounted in the final regulation. Otherwise, I would support the BIA Labor Force Report to be used as the official Indian population component.

I do not support the proposed §170.276(c). To require a state, county, or municipality to maintain a completed project in accordance with Title 23 U.S.C. §116 would constitute an un-funded mandate. First, the requirement for maintenance in §116

is for all roads constructed with federal-aid funding under Chapter 1 of Title 23 U.S.C. This does not apply to Indian Reservation Roads, which are funded and constructed under Chapter 2 of Title 23 U.S.C. Secondly, the federal government does not provide any maintenance funding to a state, county, or municipality for Indian Reservation Roads. The maintenance requirement should be deleted from §170.276(c).

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I do not support the proposed §§170.633-634 regarding self-governance compacts. First, Title IV of the ISDEAA and its implementing regulations (25 CFR Part 1000) clearly identify what programs can be assumed by an Indian tribe under a self-governance agreement. To limit tribal assumption of IRR programs to 25 CFR Part 1000, Subpart K, would unfairly limit a tribe's ability to assume a full-blown roads program as authorized by TEA-21 and the ISDEAA. Subpart K, by itself, only deals with individual construction projects and does not adequately address other activities that are non-construction related. I can find no reference in these proposed IRR regulations identifying that the IRR program is fully subject to the remainder of 25 CFR Part 1000. This is neither lawful nor is it acceptable. Finally, I object to the notion that these IRR program regulations should identify how IRR projects and activities are included in a self-governance annual funding agreement. By statute, all programs, services, functions, and activities are fully subject to negotiation and thus it is entirely inappropriate to include provisions in this regulation that would impose non-negotiable requirements for tribal assumption of the IRR program. The final regulation should reflect these facts.

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Subpart H – Miscellaneous

I do not support the proposed §§170.941-943 dealing with arbitration provisions. This issue is about what alternative dispute resolution methods are available and how alternative dispute resolution options may be used. In cases where it is appropriate, the Alternative Dispute Resolution Act (25 U.S.C.) should be available to tribes as an option to resolve disputes, even in the area of construction. This is not to take away from tribal rights regarding the Contracts Disputes Act or other dispute resolution methods authorized by the ISDEAA, but instead an alternative approach to avoid costly litigation. The final regulation should reflect this thought.

Again, I appreciate the opportunity to participate. I am hopeful that my comments will help the committee in its task of preparing the final regulation.

Sincerely,

Mary Slaton

September 18, 2002

United States Department of Transportation
Dockets Management Facility, Room PL-401
400 Seventh Street SW
Washington, DC 20590-001

Docket No. FHWA-2002-12229

To whom it may concern:

I have received a copy of the Notice of Proposed Rulemaking for the Indian Reservation Roads (IRR) Program, published in the Federal Register on August 7, 2002. I appreciate the opportunity to participate and therefore this letter is an official comment regarding the proposed rules and procedures governing the IRR program.

The State of Oklahoma has one of the largest Indian populations in the United States not mention a vast amount of Indian land that is tax exempt. Most Indian communities are located in remote rural areas where access to employment, education, and healthcare is at great distances and where road conditions are unimproved and unsafe. Even though the state provides an annual sum of $6 million in STP funding for rural collectors, it is not enough to address the rural road improvement needs of Indian communities for all 77 counties in Oklahoma. The same can be said about bridge funding. The number of deficient bridges in Oklahoma is among the highest in the nation. For all these reasons, I believe it is the federal government's responsibility to provide IRR funding for roads and bridges serving these Indian communities.

I am also familiar with the Indian Self-Determination and Education Assistance Act (Public Law 93-638, as amended) and support its full implementation throughout Indian country. This law not only creates greater tribal control, it also contributes to the local economy through employment, education, and health care. The federal government's policy should serve to advance Indian self-determination and tribal rights to self-government.

In addition to the above, I have reviewed the NPRM and have the following comments and recommendations with regard to specific sections of the proposed rule. To the extent possible, these comments generally follow the outline of the NPRM.

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I support the federal government's general policy statement outlined in §170.3 but note that many sections in the proposed rule are not consistent with this concept. This includes: §170.114; §170.116; §170.420; §170.433; §§170.480-481; §§170.485-490; §§170.501-501; §§170.600-606; §§170.614-618; §170.620; §§170.633-636; §§170.701-705; and §§170.941-943. These sections should be corrected in the final rule to reflect the concept outlined in §170.3.

Subpart B – IRR Program Policy and Eligibility

I do not support §170.114 as proposed and the list included in Appendix A to Subpart B dealing with allowable uses of IRR funding. The list of allowable uses in Appendix A does not include "indirect cost" in relation to non-construction administrative functions. The final regulation should reflect this thought.

I do not support §170.116 as proposed. This section describes the process for determining if a proposed new use of IRR funds is allowable. By allowing some determinations to be made by the Federal Highway Administration (FHWA) and others made by the Bureau of Indian Affairs (BIA) could lead to inconsistent decisions between both agencies. Secondly, the existing appeals process under the ISDEAA does not in itself apply to the FHWA. This could create a "black hole" for determinations made by the FHWA, which may leave tribes with no recourse to reverse the determination. And third, this section poses a negative impact on Indian tribes with respect to redesign and reallocation authority available under the ISDEAA. The final regulation should reflect that the Secretary of Interior makes these determinations.

Subpart C – IRR Program Funding

I agree with the Tribal Transportation Allocation Methodology identified in Subpart C with the exception of the following:

I do not support the proposed §170.276(c). To require a state, county, or municipality to maintain a completed project in accordance with Title 23 U.S.C. §116 would constitute an un-funded mandate. First, the requirement for maintenance in §116 is for all roads constructed with federal-aid funding under Chapter 1 of Title 23 U.S.C. This does not apply to Indian Reservation Roads, which are funded and constructed under Chapter 2 of Title 23 U.S.C. Secondly, the federal government does not provide any maintenance funding to a state, county, or municipality for Indian Reservation Roads. The maintenance requirement should be deleted from §170.276(c).

I do not support the proposed §170.294(c). The addition of "all IRR routes" in the inventory for funding purposes would create immediate disparity. Many BIA regions including those Oklahoma have not been allowed include additional IRR or BIA routes to the inventory because of the 2% annual limitation factor. The manner in which

§170.294(c) is written, over 30,000 miles of IRR routes would be added at a rate of 100% to the cost-to-construct and vehicle miles traveled components of the formula, so long as they met the requirements of §170.276(c). I disagree with this concept completely. Oklahoma tribes should be funded on an equal basis as other tribes across country, which includes fair and equitable treatment of the IRR inventory. Section 170.294(c) should be revised as follows: "...additional IRR routes at an annual growth rate of 2% per year at the BIA regional level."

Subpart D – Planning, Design, and Construction of IRR Program Facilities

I do not support the proposed §170.420 or §170.433, stating how and when is the IRR-TIP updated. The IRR-TIP is the official document granting Indian tribes expenditure authority for IRR projects. The proposed language does not hold BIA accountable for timely updates of the IRR-TIP except on an annual basis. It also leaves the determination up to BIA as to whether other updates are necessary. Under this scenario, Indian tribes may have to wait an entire fiscal year to receive expenditure authority for certain IRR projects. This is neither acceptable nor is an appropriate use of IRR funding. The final regulation should reflect quarterly updates of the IRR-TIP or as otherwise requested by Indian tribes.

I do not support the proposed §170.480 - Can a tribe review and approve plans, specifications, and estimates (PS&E's) for IRR projects? My disagreement is not with the confirmation that a tribe can assume this function but instead the proposed language requiring the tribe to meet the definition of a state and a required stewardship agreement with the Secretary of Transportation. Title 23 does not prohibit a tribe from assuming the PS&E approval function nor does it require a tribe to qualify as a state. Therefore, the presumption that a tribe must enter into a stewardship agreement in the same manner as a state is not valid, unless a tribe chooses to do so. Title 23 does however, recognize the Secretary of the Interior as a state and thus the PS&E approval function has been delegated to the BIA. Under the ISDEAA, all BIA programs, services, functions, activities or portion thereof, are subject to self-determination contracts and self-governance agreements. The final regulation should reflect that Indian tribes could assume the PS&E approval function under a self-determination contract or self-governance agreement.

I do not support the proposed §170.481 that identifies who must approve PS&E's for IRR projects. On top of all my concerns identified in the previous section, §170.481 poses additional requirements that the Secretary must conduct health and safety reviews of all tribally approved PS&E's. Under §403(e)(2) of the ISDEAA, the Secretary is only required to ensure that proper health and safety standards are included in the agreement. Instead, the BIA has interpreted this provision to mean they have to perform the health and safety function. This is neither required nor is it necessary. The final regulation should reflect that Indian tribes can ensure health and safety so long as proper health and safety standards are included in the contract or agreement.

I do not support the proposed §§170.484-491 dealing with project closeout reports. While it may be necessary to identify who prepares these reports, these sections, as written, violate the single-agency audit, annual trust evaluation, and reporting requirements of the ISDEAA. These activities are adequately covered in 25 CFR Part 900 and in Part 1000. The final regulation should reflect this thought.

I do not support the proposed §§170.501-502 that addresses the contents of right-of-way easement documents and who grants right-of-way. The status of the land should not dictate the content of the right-of-way document and I strongly disagree with the government's reliance upon and reference to 25 CFR 169 (Rights-of-Way Over Indian Lands) in these proposed regulations without appropriate qualifications. Part 169 primarily sets out procedures by which third parties, such as railroads, utilities, and state or local governments, obtain rights-of-ways over reservation lands. Many of the requirements of part 169 are not applicable to Indian tribes securing rights-of-way for roads through their own lands. Another concern is that some tribes have federal statutory authority to grant rights-of-way across their reservations without Secretarial approval under part 169 (See, e.g., 64 Stat. 442, as amended, 75 Stat. 499 § 2). Furthermore, there is no procedure for acquiring rights-of-way over non-alienable fee simple lands. The final regulation should contain a consistent right-of-way easement document. The final regulation should also identify that the party responsible for granting the right-of-way depends upon the status of the land in question.

Subpart E – Service Delivery for IRR

I do not support §§170.600 through §170.608 dealing with the contractibility and compactibility of IRR programs, services, functions, and activities. The ISDEAA requires the Secretary to make available all funds for services to which the Secretary would have otherwise provided to a tribe prior to an executed self-determination contract or self-governance agreement. The government's argument that the "up to 6%" is solely for performing inherent federal functions does not carry with it the proper statutory authority to do so, nor is there any evidence that congress intended to earmark these funds for non-contractible activities. I also disagree with the notion that BIA is allowed to withhold administrative funds for project related functions. To continue the practice of withholding administrative funds severely reduces a tribe's ability to directly benefit Indian communities with improved roads and bridges. The final regulation should reflect congressional intent that all IRR funds are subject to the ISDEAA, including BIA's 6%.

I do not support the proposed §§170.614 through §170.618 regarding advance payments. As written, these sections pose additional payment restrictions on tribes beyond the requirements of the ISDEAA and TEA-21. For example, a tribe is required to have an approved TIP prior to the advance payment, regardless of a tribe's share if the IRR funding formula. The net effect severely reduces a tribe's ability to receive a full lump-sum advance payment. As mentioned earlier, the TIP is the official document granting expenditure authority for IRR projects. The TIP is not however, the authority or the mechanism for a lump-sum advance payment under the ISDEAA, it is the executed

self-determination contract or self-governance agreement. The final regulation should reflect this fact.

I do not support the proposed §170.620 regarding the use of savings. I believe the federal position on this issue is completely unreasonable and eliminates the opportunity for tribes to contract, compact, and retain their rightful share of IRR program funding. To begin, Title 25 U.S.C §405e-2 does not even apply to the IRR program. Moreover, the ISDEAA and subsequent regulations are most clear in that savings are to be carried over to provide additional services to which the funds were appropriated. The final regulation should reflect the savings and profit provisions authorized by the ISDEAA.

I do not support the proposed §§170.633-634 regarding self-governance compacts. First, Title IV of the ISDEAA and its implementing regulations (25 CFR Part 1000) clearly identify what programs can be assumed by an Indian tribe under a self-governance agreement. To limit tribal assumption of IRR programs to 25 CFR Part 1000, Subpart K, would unfairly limit a tribe's ability to assume a full-blown roads program as authorized by TEA-21 and the ISDEAA. Subpart K, by itself, only deals with individual construction projects and does not adequately address other activities that are non-construction related. I can find no reference in these proposed IRR regulations identifying that the IRR program is fully subject to the remainder of 25 CFR Part 1000. This is neither lawful nor is it acceptable. Finally, I object to the notion that these IRR program regulations should identify how IRR projects and activities are included in a self-governance annual funding agreement. By statute, all programs, services, functions, and activities are fully subject to negotiation and thus it is entirely inappropriate to include provisions in this regulation that would impose non-negotiable requirements for tribal assumption of the IRR program. The final regulation should reflect these facts.

I do not support the proposed §§170.635-636 dealing with contract support funds. The government's position that contract support funding is not available or applicable to the IRR program is totally inconsistent with the ISDEAA and OMB Circular A-87. Currently, the Interior Department is required to make contract support funding available for all such contracts and agreements in accordance with §106(a) and §403 of the ISDEAA, regardless of program origin. The final regulation should reflect this fact.

Subpart F – Program Oversight and Accountability

I do not support the proposed §§170.701-705 – Content of stewardship agreements. My disagreement with these sections is closely related to PS&E approval authority as discussed earlier. The issue here is whether a tribe is allowed to enter into a stewardship agreement with the FHWA thereby assuming PS&E approval authority, outside of a self-determination contract or self-governance agreement. The answers is yes, nothing in Title 23 U.S.C. prohibits a tribe from entering into a stewardship agreement if the tribe chooses to do so. However, the provisions of a stewardship agreement may be included in a self-determination contract or self-governance agreement if the tribe chooses to do so. I disagree however, with the government's proposal to place additional restrictions and bureaucratic control within the context of these agreements.

The final regulation should incorporate provisions, based on the redesign authorities of the ISDEAA, which allows tribes the choice of whether to include the PS&E approval function within the context of a separate stewardship agreement, a self-determination contract, or in a self-governance agreement.

Subpart H – Miscellaneous

I do not support the proposed §§170.941-943 dealing with arbitration provisions. This issue is about what alternative dispute resolution methods are available and how alternative dispute resolution options may be used. In cases where it is appropriate, the Alternative Dispute Resolution Act (25 U.S.C.) should be available to tribes as an option to resolve disputes, even in the area of construction. This is not to take away from tribal rights regarding the Contracts Disputes Act or other dispute resolution methods authorized by the ISDEAA, but instead an alternative approach to avoid costly litigation. The final regulation should reflect this thought.

Again, I appreciate the opportunity to participate. I am hopeful that my comments will help the committee in its task of preparing the final regulation.

Sincerely, Daniel L. Hensley

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I do not support the proposed §170.276(c). To require a state, county, or municipality to maintain a completed project in accordance with Title 23 U.S.C. §116 would constitute an un-funded mandate. First, the requirement for maintenance in §116

is for all roads constructed with federal-aid funding under Chapter 1 of Title 23 U.S.C. This does not apply to Indian Reservation Roads, which are funded and constructed under Chapter 2 of Title 23 U.S.C. Secondly, the federal government does not provide any maintenance funding to a state, county, or municipality for Indian Reservation Roads. The maintenance requirement should be deleted from §170.276(c).

I do not support the proposed §170.294(c). The addition of "all IRR routes" in the inventory for funding purposes would create immediate disparity. Many BIA regions including those in Oklahoma have not been allowed include additional IRR or BIA routes to the inventory because of the 2% annual limitation factor. The manner in which §170.294(c) is written, over 30,000 miles of IRR routes would be added at a rate of 100% to the cost-to-construct and vehicle miles traveled components of the formula, so long as they met the requirements of §170.276(c). I disagree with this concept completely. Oklahoma tribes should be funded on an equal basis as other tribes across country, which includes fair and equitable treatment of the IRR inventory. Section 170.294(c) should be revised as follows: "...additional IRR routes at an annual growth rate of 2% per year at the BIA regional level."

Subpart D – Planning, Design, and Construction of IRR Program Facilities

I do not support the proposed §170.420 or §170.433, stating how and when is the IRR-TIP updated. The IRR-TIP is the official document granting Indian tribes expenditure authority for IRR projects. The proposed language does not hold BIA accountable for timely updates of the IRR-TIP except on an annual basis. It also leaves the determination up to BIA as to whether other updates are necessary. Under this scenario, Indian tribes may have to wait an entire fiscal year to receive expenditure authority for certain IRR projects. This is neither acceptable nor is an appropriate use of IRR funding. The final regulation should reflect quarterly updates of the IRR-TIP or as otherwise requested by Indian tribes.

I do not support the proposed §170.480 - Can a tribe review and approve plans, specifications, and estimates (PS&E's) for IRR projects? My disagreement is not with the confirmation that a tribe can assume this function but instead the proposed language requiring the tribe to meet the definition of a state and a required stewardship agreement with the Secretary of Transportation. Title 23 does not prohibit a tribe from assuming the PS&E approval function nor does it require a tribe to qualify as a state. Therefore, the presumption that a tribe must enter into a stewardship agreement in the same manner as a state is not valid, unless a tribe chooses to do so. Title 23 does however, recognize the Secretary of the Interior as a state and thus the PS&E approval function has been delegated to the BIA. Under the ISDEAA, all BIA programs, services, functions, activities or portion thereof, are subject to self-determination contracts and self-governance agreements. The final regulation should reflect that Indian tribes could assume the PS&E approval function under a self-determination contract or self-governance agreement.

I do not support the proposed §170.481 that identifies who must approve PS&E's for IRR projects. On top of all my concerns identified in the previous section, §170.481 poses additional requirements that the Secretary must conduct health and safety reviews of all tribally approved PS&E's. Under §403(e)(2) of the ISDEAA, the Secretary is only required to ensure that proper health and safety standards are included in the agreement. Instead, the BIA has interpreted this provision to mean they have to perform the health and safety function. This is neither required nor is it necessary. The final regulation should reflect that Indian tribes can ensure health and safety so long as proper health and safety standards are included in the contract or agreement.

I do not support the proposed §§170.484-491 dealing with project closeout reports. While it may be necessary to identify who prepares these reports, these sections, as written, violate the single-agency audit, annual trust evaluation, and reporting requirements of the ISDEAA. These activities are adequately covered in 25 CFR Part 900 and in Part 1000. The final regulation should reflect this thought.

I do not support the proposed §§170.501-502. These sections address the contents of a right-of-way easement document and who grants right-of-way. The status of the land should not dictate the content of the right-of-way document and I strongly disagree with the government's reliance upon and reference to 25 CFR 169 (Rights-of-Way Over Indian Lands) in these proposed regulations without appropriate qualifications. Part 169 primarily sets out procedures by which third parties, such as railroads, utilities, and state or local governments, obtain rights-of-ways over reservation lands. Many of the requirements of part 169 are not applicable to Indian tribes securing rights-of-way for roads through their own lands. Another concern is that some tribes have federal statutory authority to grant rights-of-way across their reservations without Secretarial approval under part 169 (See, e.g., 64 Stat. 442, as amended, 75 Stat. 499 § 2). Furthermore, there is no procedure for acquiring rights-of-way over non-alienable fee simple lands. The final regulation should contain a consistent right-of-way easement document. The final regulation should also identify that the party responsible for granting the right-of-way depends upon the status of the land in question.

Subpart E – Service Delivery for IRR

I do not support §§170.600 through §170.608 dealing with the contractibility and compactibility of IRR programs, services, functions, and activities. The ISDEAA requires the Secretary to make available all funds for services to which the Secretary would have otherwise provided to a tribe prior to an executed self-determination contract or self-governance agreement. The government's argument that the "up to 6%" is solely for performing inherent federal functions does not carry with it the proper statutory authority to do so, nor is there any evidence that congress intended to earmark these funds for non-contractible activities. I also disagree with the notion that BIA is allowed to withhold administrative funds for project related functions. To continue the practice of withholding administrative funds severely reduces a tribe's ability to directly benefit Indian communities with improved roads and bridges. The final regulation should reflect congressional intent that all IRR funds are subject to the ISDEAA, including BIA's 6%.

I do not support the proposed §§170.614 through §170.618 regarding advance payments. As written, these sections pose additional payment restrictions on tribes beyond the requirements of the ISDEAA and TEA-21. For example, a tribe is required to have an approved TIP prior to the advance payment, regardless of a tribe's share if the IRR funding formula. The net effect severely reduces a tribe's ability to receive a full lump-sum advance payment. As mentioned earlier, the TIP is the official document granting expenditure authority for IRR projects. The TIP is not however, the authority or the mechanism for a lump-sum advance payment under the ISDEAA, it is the executed self-determination contract or self-governance agreement. The final regulation should reflect this fact.

I do not support the proposed §170.620 regarding the use of savings. I believe the federal position on this issue is completely unreasonable and eliminates the opportunity for tribes to contract, compact, and retain their rightful share of IRR program funding. To begin, Title 25 U.S.C §405e-2 does not even apply to the IRR program. Moreover, the ISDEAA and subsequent regulations are most clear in that savings are to be carried over to provide additional services to which the funds were appropriated. The final regulation should reflect the savings and profit provisions authorized by the ISDEAA.

I do not support the proposed §§170.633-634 regarding self-governance compacts. First, Title IV of the ISDEAA and its implementing regulations (25 CFR Part 1000) clearly identify what programs can be assumed by an Indian tribe under a self-governance agreement. To limit tribal assumption of IRR programs to 25 CFR Part 1000, Subpart K, would unfairly limit a tribe's ability to assume a full-blown roads program as authorized by TEA-21 and the ISDEAA. Subpart K, by itself, only deals with individual construction projects and does not adequately address other activities that are non-construction related. I can find no reference in these proposed IRR regulations identifying that the IRR program is fully subject to the remainder of 25 CFR Part 1000. This is neither lawful nor is it acceptable. Finally, I object to the notion that these IRR program regulations should identify how IRR projects and activities are included in a self-governance annual funding agreement. By statute, all programs, services, functions, and activities are fully subject to negotiation and thus it is entirely inappropriate to include provisions in this regulation that would impose non-negotiable requirements for tribal assumption of the IRR program. The final regulation should reflect these facts.

I do not support the proposed §§170.635-636 dealing with contract support funds. The government's position that contract support funding is not available or applicable to the IRR program is totally inconsistent with the ISDEAA and OMB Circular A-87. Currently, the Interior Department is required to make contract support funding available for all such contracts and agreements in accordance with §106(a) and §403 of the ISDEAA, regardless of program origin. The final regulation should reflect this fact.

Subpart F – Program Oversight and Accountability

I do not support the proposed §§170.701-705 – Content of stewardship agreements. My disagreement with these sections is closely related to PS&E approval authority as discussed earlier. The issue here is whether a tribe is allowed to enter into a stewardship agreement with the FHWA thereby assuming PS&E approval authority, outside of a self-determination contract or self-governance agreement. The answers is yes, nothing in Title 23 U.S.C. prohibits a tribe from entering into a stewardship agreement if the tribe chooses to do so. However, the provisions of a stewardship agreement may be included in a self-determination contract or self-governance agreement if the tribe chooses to do so. I disagree however, with the government's proposal to place additional restrictions and bureaucratic control within the context of these agreements. The final regulation should incorporate provisions, based on the redesign authorities of the ISDEAA, which allows tribes the choice of whether to include the PS&E approval function within the context of a separate stewardship agreement, a self-determination contract, or in a self-governance agreement.

Subpart H – Miscellaneous

I do not support the proposed §§170.941-943 dealing with arbitration provisions. This issue is about what alternative dispute resolution methods are available and how alternative dispute resolution options may be used. In cases where it is appropriate, the Alternative Dispute Resolution Act (25 U.S.C.) should be available to tribes as an option to resolve disputes, even in the area of construction. This is not to take away from tribal rights regarding the Contracts Disputes Act or other dispute resolution methods authorized by the ISDEAA, but instead an alternative approach to avoid costly litigation. The final regulation should reflect this thought.

Again, I appreciate the opportunity to participate. I am hopeful that my comments will help the committee in its task of preparing the final regulation.

Sincerely,